

CHAPTER 6

LABOR REQUIREMENTS

OVERVIEW

This chapter provides an overview of state labor requirements that govern the payment of wages for laborers and mechanics employed under construction contracts funded in whole or in part by TSEP funds.

If federal funds will be used to help fund a TSEP funded public facilities project, the federal labor requirements may supersede those of the state. The pertinent federal labor requirements vary among federal agencies. For example:

- **the Community Development Block Grant (CDBG) program requires compliance with the federal Davis-Bacon Act, while**
- **the U.S. Department of Agriculture, Rural Development program, and the two State Revolving Fund (SRF) programs, do not require local governments to use the federal Davis-Bacon prevailing wage rates.**

If federal funds will be involved in your TSEP project, you should consult with each of the federal agencies funding the project for guidance on which federal labor laws or regulations will apply to your project.

APPLICABLE STATE REQUIREMENTS

The following laws provide the statutory authority for the state requirements related to workers' wages and hours on projects receiving TSEP assistance:

Public Construction Contracts: Special Labor Conditions (Title 18, Chapter 2, Part 4, MCA) includes special labor requirements applicable to state or local public works projects:

Section 18-2-402, MCA, provides for the Montana Commissioner of Labor to determine the prevailing wages that will apply to public works projects which are not subject to the federal prevailing wage law, the Davis-Bacon Act. The Montana prevailing wage law is often referred to as the "Little Davis-Bacon Act."

Under the provisions of the Montana law, the Montana Department of Labor and Industry (MDLI) periodically surveys the wages being paid in the construction industry statewide and determines the average wages, including fringe benefits, being paid for similar types of construction work on public projects. The prevailing wage rates set by MDLI cannot be

greater than the wage rates in the area which have been negotiated under current collective bargaining agreements (union scale).

Section 18-2-403, MCA, requires that a preference for the hiring of Montana residents for construction work be included in all bid specifications and contracts for public works projects that are not subject to federal requirements that prohibit such preferences.

This section also requires the payment of prevailing wages, including fringe benefits, and travel allowances for workers on all public works projects. **All bid specifications and contracts for public works projects must include the prevailing wage rates, including fringe benefits, which the contractors and subcontractors must pay for each job classification during construction of the project.** At a minimum, contractors must pay the prevailing wage rates unless the workers are covered by a collective bargaining agreement that provides higher wage rates. **The law also provides that if a public agency or local government fails to include the prevailing wage rate requirements in a bid specification or contract, the contractor is relieved from the obligation to pay the prevailing wage rate and the obligation is then placed on the public contracting agency.**

Section 18-2-404, MCA, requires that the legal adviser for the contracting public agency (in this case, the TSEP grant recipient) must approve all public works contracts in writing. It also provides that at least \$1,000 of the contract price must be withheld until termination of the contract.

Section 18-2-406, MCA, requires that all contractors and subcontractors working on a public works contract must post the prevailing wage rates to be paid to employees in a prominent and accessible site on the project or work area not later than the first day of work.

Section 18-2-407, MCA, was amended in 1993 to provide that any contractor, subcontractor, or employer who pays an employee less than the required prevailing wage must pay the MDLI a penalty of up to 20% of the delinquent wages and fringe benefits plus court or attorney fees and audit fees. They must also pay the employee the wages owed plus \$25 a day for each day the employee was underpaid.

Section 18-2-412, MCA, was amended in 1993 to allow contractors and subcontractors to pay the standard prevailing wage rates using one of three methods:

1. pay the amount of the fringe benefits and the basic hourly rate directly to the worker in cash;
2. make an irrevocable contribution to a trustee or third person pursuant to a fringe benefit fund plan or program that meets the requirements of the

Employee Retirement Income Security Act (ERISA) of 1974 or that is a bona fide program approved by the U.S. Department of Labor; or

3. make payments using a combination of 1 or 2, above, so the aggregate of cash payments and contributions is no less than the standard prevailing rate of wages, including fringe benefits for health, welfare, pension contributions that meet the requirements of the ERISA of 1974, travel, and other programs approved by the United States Department of Labor.

Section 18-2-422, MCA, requires that all public works contracts and the bid specifications for those contracts must contain:

1. a provision stating for each job classification the standard prevailing wage rate, including fringe benefits, that contractors and employers shall pay during construction of the project,
2. a provision requiring each contractor and employer to maintain payroll records in a manner readily capable of being certified for submission under 18-2-423, MCA, for not less than three years after the contractor's completion of work on the project, and
3. a provision requiring each contractor to post a statement of all wages and fringe benefits in compliance with 18-2-423, MCA.

Section 18-2-423, MCA, was amended in 1993 to require contractors and subcontractors to pay employees receiving an hourly wage on a weekly basis.

Section 18-2-432, MCA, provides that a contractor or subcontractor who is found by MDLI to have willfully violated the law can be barred from receiving public works contracts or subcontracts for a three-year period.

Workers' Compensation Act (Title 39, Chapter 71, Part 1, MCA) requires employers to provide workers' compensation insurance to assure wage supplements and medical benefits for works suffering from work-related injury or disease.

The above is a brief summary of Montana's major labor laws. Local officials and staff or TSEP project consultants should always consult the actual text of current Montana law if any questions arise. For guidance on application of Montana's prevailing wage law you should also contact:

Labor Standards Bureau
Montana Department of Labor and Industry
PO Box 6518
Helena, MT 59604

Telephone: (406) 444-5600

Website: <http://erd.dli.state.mt.us/laborstandard/lshome.asp>

TSEP GRANT RECIPIENT RESPONSIBILITIES

TSEP funded construction projects require that the TSEP grant recipient take the following actions to ensure that all requirements related to labor standards are satisfied.

Step 1 - Designate a Person to Monitor Prevailing Wage Compliance

Compliance with the applicable state prevailing wage provisions by TSEP grant recipients is a condition for receipt of TSEP assistance. Accordingly, each TSEP grant recipient must identify a person who will be responsible for prevailing wage compliance in the TSEP grant recipient's project management plan, as discussed in Chapter 1, Project Startup. In most cases this will be the grant administrator who has been assigned overall administrative responsibility. In some cases, the project engineer may agree to oversee prevailing wage compliance.

Step 2 - Include Prevailing Wage Rates and TSEP Supplemental Conditions in Bid Documents

The bid documents, including engineering plans and specifications, are normally prepared by the TSEP grant recipient's project engineer. **Montana's prevailing wage law requires that a prevailing wage clause be included in all solicitations for bids and contracts for projects. In addition, all bid specifications and contracts for public works projects must include the prevailing wage rates, including fringe benefits, which the contractors and subcontractors must pay for each job classification during construction of the project.** The MDLI determines what the prevailing wage rates will be every year for "Heavy", "Highway" and "Building" wage rates. These are published and available on their website. If you are unsure of which prevailing wage rates apply to your project, and therefore should be included in the bid document, contact MDLI for assistance. In order to make a determination, MDLI will need to know the following information:

- ☐ estimated contract cost;
- ☐ type of work (e.g., installation of waterlines, building construction, etc.);
- ☐ project location; and
- ☐ anticipated bid opening date.

Prevailing wage rates are meant to be all-inclusive and representative of an area's prevailing basic wage and fringe benefits for every type of job classification of laborers and

mechanics within their respective industry category. State "Heavy" and "Highway" wage rates are issued on an area basis according to the job classification involved. "Building" construction wage rates are issued according to ten state districts. Wage rates will vary according to the different zones or areas designated within the state and the groups of similar job classifications, such as equipment operators.

Under ARM 24.17.127, the wage rates applicable to a particular public works project are those in effect at the time the bid specifications are advertised. As a result, the TSEP grant recipient's grant administrator should check the MDLI website immediately prior to bid advertising to re-verify that the wage determination is still current.

In many cases, TSEP projects will use only the Heavy prevailing wage rates. However, in certain cases, multiple wage rates must be included in the bid document by the project engineer. A guideline, referred to as the "20% Test", can generally be followed to determine when multiple wage rates should be used for TSEP-funded construction contracts (ARM 24.17.526). For example, this "rule-of-thumb" provides that if building construction is a "significant component" of the project, (the budget for building construction exceeds 20% of the total anticipated construction contract amount), then the project engineer should include both Heavy and Building rates in the bid document. The same "20% Test" concept would apply to a public facility project which is principally building construction, such as a sewage treatment plant, but which also includes more than 20% of non-building construction activity. In such cases, the project engineer should include both Building and Heavy prevailing wage rates in the bid document.

In the event the construction project will involve laborers or mechanics with job classifications that do not appear on the MDLI wage determination, the TSEP grant recipient's grant administrator must make a request to MDLI for an appropriate job classification and determination of the prevailing wage rate.

In addition, specific bid and contract language and certifications are provided in the TSEP Supplemental General Conditions, which appears as Exhibit 8-A, Chapter 8, Public Facilities Construction Management.

Step 3 - Verify Bidder Eligibility

Contractors or subcontractors found by the MDLI to have aggravatedly or willfully violated the provision of the state prevailing wage law may be barred from receiving contracts or subcontracts subject to the provisions of the law for a period not to exceed three years after the date of entry of a final judgment. **TSEP grant recipients must contact their TSEP liaison to obtain clearance on all proposed prime contractors and subcontractors prior to awarding any TSEP funded contracts.** As soon as possible following the bid opening, and before awarding any construction contract, your TSEP liaison should be given the names of the firm and its principal owner(s) selected for the pending contract to determine if that contractor has been debarred under Montana law. (See sample letter,

Exhibit 6-A.) If the contractor is determined to be ineligible, you may offer the contract to the first alternate bidder or may reopen the bidding procedures. A copy of any correspondence sent or received from MDOC or notes taken for telephone contacts with MDOC should be retained to document this step.

Step 4 - Inform Contractor of Applicable Requirements by Conducting a Preconstruction Conference

Following the contract award for construction projects involving TSEP funds, the TSEP grant recipient must hold a preconstruction conference. The TSEP grant recipient and prime contractor should include all subcontractors in the discussions to ensure that they are aware that they must also comply with the prevailing wage and equal employment opportunity provisions. The engineer will attend the conference to cover the technical or other contract-related issues for the TSEP grant recipient. The TSEP grant recipient's grant administrator will then cover the state and local compliance issues.

The preconstruction conference represents a key opportunity prior to the beginning of project construction for giving instructions to the contractor. A well-planned and executed conference can help prevent problems and misunderstandings that could delay the project at a later date.

To assist TSEP grant recipients in preparing for and conducting the required preconstruction conferences for TSEP-funded construction contracts, a Preconstruction Conference Planning Guide (Exhibit 6-B) has been provided. This contains guidance for conference preparation, a general format to be used as an agenda, supplemental information on labor standards and civil rights requirements, and a blank conference checklist and agenda which can be followed to record minutes for the conference.

At a minimum, the preconstruction conference should include discussions of:

- ☐ prevailing wage requirements, including posting prevailing wages continually at the job site;
- ☐ employment of apprentices or trainees;
- ☐ weekly pay for employees;
- ☐ submission of weekly payrolls;
- ☐ penalties if prevailing wage requirements are not complied with;
- ☐ payment of overtime;
- ☐ equal employment opportunity requirements;

- ☐ employment of Montana workers; and
- ☐ the use of bona fide, registered subcontractors.

In order to document discussions that occur during the preconstruction conference, the TSEP grant recipient is required to record minutes of the conference. A verbatim record is not necessary; the names of the persons who attend and a summary of the comments and issues covered are sufficient. The TSEP grant recipient's grant administrator should ensure that a copy of the preconstruction conference minutes is on file and sent to the TSEP liaison. **Copies of pages 6-B.3 through 6-B.8 should be provided to each contractor and subcontractor representative that attends the preconstruction conference as well as a summary of the key labor requirements that must be complied with.**

In accordance with Montana's prevailing wage law, a copy of the prevailing wage rates must be posted at the construction site at all times, beginning with the first day of construction work. It must be posted in a prominent and easily accessible location on the project site.

Contractor reporting requirements include:

- ☐ Weekly Payroll Reports, which must be submitted weekly by both the prime contractor and subcontractor(s); and
- ☐ Notice of Approved Apprenticeship or Trainee Program, which must also be submitted, if applicable.

Contractors must use the standard U.S. Department of Labor (DOL), Payroll Form WH-347 (See sample Form WH-347, Exhibit 6-C), or an equivalent form. The text of the "weekly statement with respect to the payment of wages," which is required by regulations of the Secretary of Labor, appears on the reverse side of the DOL form. Many contractors now use computerized weekly payrolls in lieu of the standard Payroll Form WH-347. This is acceptable as long as the basic information contained on the WH-347 is provided and the contractor includes a signed certification for each payroll by using the "Statement of Compliance" Form WH-348 (See sample Form WH-348, Exhibit 6-C).

Exhibit 6-C, Weekly Payroll Report Forms: WH-347 and WH-348, not only contains samples of these forms but examples and instructions for the contractor to follow for completing and filing them on the project. For example, the TSEP grant recipient should be aware that weekly payroll reports are required from subcontractors identified as "working owners". (See paragraph #7 on page 6-D.7). A "sole-proprietor", who performs alone on the project or owners, partners or relatives, will still submit weekly payrolls showing himself or herself as "owner" or "partner", the work classification and the daily and total hours

worked. See Exhibit 6-B for additional discussion of requirements applicable to subcontractors and sole proprietors.

To provide additional detailed guidance to contractors for the proper completion and use of the above weekly payroll reports, Contractor Payroll Instructions are provided as Exhibit 6-D. The U.S. Department of Labor payroll forms can be ordered from the Superintendent of Documents, Government Printing Office, Washington, D.C. 80402.

Step 5 - Monitor Contractor Performance

It is the local TSEP grant administrator's responsibility to monitor construction contracts to ensure that current prevailing wages are posted prominently at the construction site, that the contractor's weekly payroll reports are accurate and submitted weekly as required, and that the contractor is complying with applicable labor requirements. This monitoring function can be accomplished through the following activities:

- ☐ **on-site inspections to ensure that required notices and copies of the applicable prevailing wage rates are posted and easily accessible to workers.** For posting the required prevailing wages at the job site, the contractor can use a bulletin board attached to the side of a temporary field office or storage trailer or a plywood billboard located near the site of field construction activities. The current wage rates can be placed in a plastic covering to protect them from weather. Regardless of the method used, it is the contractor's responsibility to provide reasonable access for employees to a copy of the state prevailing wage rates. The contractor's employees should not have to request to see a copy of the wage rates.
- ☐ **comparison of weekly payroll reports to the required prevailing wage rates.** Payroll reports must be submitted by the contractor within seven days following completion of the workweek and should be reviewed by the TSEP grant recipient's grant administrator on a timely basis, usually within one week of receipt. At a minimum, the TSEP grant recipient's grant administrator should initial and date each payroll to document that the payroll review has been completed. Any errors or discrepancies should be noted on the payroll form. Also, contractors may use a numerical code system for reporting job classifications on their payroll form. If a numerical code system is used, the TSEP grant recipient's grant administrator should ensure that the contractor submits a copy of the numerical code system with the initial payroll report. The codes on the payroll should be checked to ensure that they appear to accurately reflect the actual duties of workers at the job site.
- ☐ **interviews with construction employees.** The TSEP grant recipient's grant administrator must ensure that the employees of each of the contractors or subcontractors are being properly paid. This is done by interviewing the employees of each contractor or subcontractor on the project, and comparing the information obtained

from those interviews to the corresponding payrolls. In order to ensure that employees of each of the contractors or subcontractors are being interviewed, the grant administrator should coordinate with the on-site engineer or superintendent to know when each of the contractors or subcontractors are expected to be on the project site. It is not critical that each individual employee is interviewed, however, over the course of a project, **interviews should be conducted with a representative of each classification of laborers or mechanics from each contractor or subcontractor on the project site, and at least 10 percent of the construction workforce should be interviewed during the term of the project.** In order to avoid potential problems, the grant administrator should, at a minimum, visit the project site at least every other week in order to conduct interviews.

The form to be used for construction employee interviews, instructions for conducting the interviews, a completed sample interview form, and instructions for finding the appropriate wage rate based on the sample interview are provided as Exhibit 6-E.

Additional guidance on payroll review, interviewing contractors' employees, and a summary of frequently used terms relating to prevailing wage compliance is provided in Exhibit 6-F.

As mentioned in Step 7, you must maintain adequate records to demonstrate that state prevailing wage requirements have been complied with. When monitoring the project, MDOC will review the records to determine whether the grant recipient has taken appropriate steps to ensure that state prevailing wage requirements have been complied with.

Step 6 - Investigate Labor Complaints and Violations

Violations of prevailing wage or other labor requirements may surface as the result of either monitoring or through a specific complaint by a construction worker. In either instance, TSEP grant recipients are responsible for investigating and documenting the alleged violation.

If a violation is evident, the grant administrator should first work with the contractor on an informal basis to resolve the problem and allow a reasonable time for correction. Where the contractor refuses to address the violation or continues to violate the labor requirements, the TSEP liaison and MDLI should be promptly notified in writing of the violation. The contractor should be informed that an unresolved prevailing wage violation could result in monetary penalties and make the contractor ineligible to work on public works construction projects in the future.

Step 7 - Maintain Prevailing Wage Files

For each construction contract, a prevailing wage file should be maintained which includes the following items:

- ☐ a copy of all applicable wage rate decisions;
- ☐ evidence that prevailing wage provisions are included in bid packages and contracts;
- ☐ telephone notes or correspondence regarding contractor eligibility;
- ☐ a copy of the preconstruction conference minutes;
- ☐ evidence that required prevailing wage notices have been continually posted at the construction site;
- ☐ the contractor's weekly payroll reports (numbered sequentially and the final one marked "Final");
- ☐ evidence that the weekly payroll reports have been promptly reviewed and verified as correct;
- ☐ records of construction worker interviews;
- ☐ evidence of any violations with supporting documentation; and
- ☐ evidence of the resolution of any violations.

SUMMARY

Compliance with state prevailing wage requirements is the responsibility of all TSEP grant recipients. Accordingly, TSEP grant recipients are responsible for ensuring compliance with prevailing wage requirements by:

1. Before the start of construction, designating a local staff person or consultant to ensure compliance with state prevailing wage requirements and to act as liaison with the contractor and MDOC;
2. Ensuring that all bid documents, contracts and subcontracts contain applicable prevailing wage provisions and the current state wage determination(s), and that all contractors and subcontractors are not currently debarred from working on Montana public works projects;
3. Conducting a preconstruction conference to inform all contractors and subcontractors performing contract construction work of their prevailing wage and other labor obligations;

4. Conducting on-site project inspections, which include employee interviews and checking for posting of current wage determinations at the project site;
5. Reviewing weekly payrolls for correctness;
6. Resolving all labor violations promptly; and
7. Maintaining detailed records to document all administrative and enforcement activities with respect to labor requirements including weekly payrolls, wage determinations, notices of start of construction, on-site inspection and employee interview reports, preconstruction conference minutes, and enforcement actions such as wage restitution.

CHAPTER 6

EXHIBITS

- 6-A Request for Verification of Bidder Eligibility
- 6-B Preconstruction Conference Planning Guide
- 6-C Weekly Payroll Report Forms: WH-347 and, Statement of Compliance, WH-348
- 6-D Contractor Payroll Instructions
- 6-E Prevailing Wage Employee Interview Form
- 6-F Prevailing Wage Compliance Terminology